93-723

No.

Supreme Court, U.S.
FILED
NOV 5 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue show minors engaging in sexually explicit acts.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 982 F.2d 1285. Two opinions of the district court (App., *infra*, 30a-36a, 37a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1992. A rehearing petition was denied on July 9, 1993. App., *infra*, 43a. On September 24, 1993, Justice O'Connor granted the government an extension

of time within which to file a petition for a writ of certiorari to and including November 6, 1993 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions—18 U.S.C. 2251, 2252, and 2256—are reprinted at App., *infra*, 44a-47a.

STATEMENT

After a bench trial in the United States District Court for the Central District of California, respondents were convicted on one count of shipping child pornography, in violation of 18 U.S.C. 2252(a)(1); one count of distributing child pornography, in violation of 18 U.S.C. 2252(a)(2); and one count of conspiring to violate 18 U.S.C. 2252.[1] Respondent Gottesman was sentenced to 12 months' imprisonment on one count. The sentences on the remaining two counts were suspended in favor of three years' probation. Respondent X-Citement Video, Inc., was fined $250,000 on each count, all but $100,000 of which was suspended. The court of appeals reversed, with one judge dissenting in part. App., *infra*, 1a-29a.

1. The evidence at trial showed that in June 1986 Los Angeles Police Officer Steven Takeshita and FBI Special Agent Nellie Magdaloyo, posing as pornography distributors, met with Gottesman at the business premises of X-Citement Video, which Gottesman owned. At

[1] The district court acquitted respondents on one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and six counts of using a common carrier to ship obscene material in interstate commerce, in violation of 18 U.S.C. 1462.

the meeting, Gottesman agreed to ship videotapes showing adults engaging in sexually explicit conduct to the store Takeshita supposedly owned in Hawaii, which Magdaloyo was said to manage. The next month, Takeshita returned to X-Citement Video and spoke with Gottesman, who mentioned that he was keeping some tapes at his residence because of the Traci Lords investigation. Newspaper articles appearing at that time reported that Lords had appeared in pornographic films while she was under age 18. Gov't C.A. Excerpts of Record 18-21, 27-28; GXs 220, 221.

Approximately six months later, Takeshita returned to X-Citement Video to purchase additional videotapes. During that visit, Gottesman offered to sell Takeshita the Traci Lords tapes, which he had on the premises. Gottesman instructed an employee, Steve Orenstein, to show Takeshita the tapes, but Orenstein declined, saying that he knew the tapes were illegal and that he did not want to get arrested. Gottesman then took Takeshita upstairs and showed him 49 tapes featuring Lords, including two that she made when she was 15. When Takeshita asked which films were made when Lords was that age, Orenstein (who by that time had joined Gottesman and Takeshita), pointed out the two films. Gov't C.A. Excerpts of Record 34-40.

In discussing the purchase of the tapes, Gottesman said that he would accept only cash because he did not want to create any record of the transactions. He also declined to ship the tapes to Hawaii, noting that he was currently under federal investigation. Gottesman said that if Takeshita got arrested, Gottesman would not acknowledge where the tapes came from. Gov't C.A. Excerpts of Record 41-43.

When Takeshita arrived at X-Citement Video the next day to pick up the tapes, Gottesman recommended

that Takeshita sell the tapes for $50 each. He cautioned that if a customer were willing to pay more than $50 he was probably a police officer. Gottesman advised Takeshita that it was safe to sell the tapes in Hawaii because, he said, the government does not prosecute sales of child pornography there. Gottesman supplied Takeshita with 50 videotapes featuring Lords before her eighteenth birthday. That transaction was the basis for the charge that respondents distributed child pornography in violation of 18 U.S.C. 2252(a)(2). Gov't C.A. Excerpts of Record 48-52; Def't C.A. Excerpt of Record 31.

When Takeshita returned to X-Citement Video on February 13, 1987, Gottesman informed him that he had 56 additional Traci Lords tapes available for a total price of $1,000. Gottesman refused Takeshita's request to ship the tapes to Hawaii, explaining that because Lords was a minor he would be knowingly shipping child pornography interstate in violation of the law. Approximately two months later, however, Gottesman agreed to ship the tapes to Hawaii. That transaction was the basis for the charge that respondents distributed child pornography in violation of 18 U.S.C. 2252(a)(2). Gov't C.A. Excerpts of Record 54-56, 70; Def't C.A. Excerpt of Record 32.

2. Following the bench trial, the district court found as a fact that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." App., *infra*, 39a ¶ 7. The court then found respondents guilty of violating 18 U.S.C. 2252(a), which provides that any person who "(1) knowingly transports or ships * * * any visual depiction * * * involv[ing] the use of a minor engaging in sexually explicit conduct" or "(2) knowingly

receives, or distributes, any visual depiction * * * involv[ing] the use of a minor engaging in sexually explicit conduct," has committed a felony. The court concluded as a matter of law that "the [g]overnment was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age." App., *infra*, 41a ¶ 2.

After respondents filed a notice of appeal, they requested and obtained a remand to the district court for reconsideration in light of the Ninth Circuit's decision in *United States* v. *Thomas*, 893 F.2d 1066, cert. denied, 498 U.S. 826 (1990), in which the court indicated that Section 2252 does not require the government to prove that the defendant knew the materials he distributed were *child* pornography. Respondents argued in the district court that, as construed in *Thomas*, Section 2252 violates the First Amendment and the Due Process Clause. The district court rejected those claims. App., *infra*, 36a.

3. The court of appeals felt constrained by *Thomas* to hold that Section 2252 does not require "scienter of the minority of the performers," even though it requires proof that the defendant acted "knowingly." App., *infra*, 11a. The court then went on to conclude, in reliance on *Smith* v. *California*, 361 U.S. 147 (1959); *Hamling* v. *United States*, 418 U.S. 87 (1974); and *New York* v. *Ferber*, 458 U.S. 747 (1982), that "the constitutional minimum requirement of scienter for the Act's proscription of transporting or receiving child pornography is knowledge that at least one of the performers is under age 18." App., *infra*, 14a. In light of *Thomas*, the court declined to engraft a scienter requirement onto the statute in order to avoid holding it unconstitutional. *Id.* at

16a. Because Section 2252, as construed in *Thomas*, does not "require knowledge of the minority of the performers as an element of the crime it defines," the court concluded that the statute is "unconstitutional on its face." App., *infra*, 15a, 17a. Accordingly, the court reversed respondents' convictions.[2]

In dissenting in part, Judge Kozinski agreed that the word "knowingly" in Section 2252 "does not apply to the age of the depicted children." App., *infra*, 23a. He concluded, however, that it was the court's duty to read a scienter requirement into the statute to render it constitutional. *Id.* at 27a. He pointed out that "[s]tatutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations." *Ibid.*

The scienter requirement Judge Kozinski would have read into the statute was one of "recklessness." Judge Kozinski stated that this Court held in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), that "recklessness is a sufficient mental state to support a conviction in a child pornography case," and concluded that "[i]t is inconceivable that, given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter." App., *infra*, 23a, 28a. Judge Kozinski would have reversed

[2] Before holding the federal child pornography statute unconstitutional on the ground that it lacks a scienter requirement, the court of appeals rejected respondents' arguments that the statute is unconstitutionally vague and overbroad because (a) "minor" is defined in 18 U.S.C. 2256 as a person under age 18; (b) Section 2256 uses the word "lascivious" instead of "lewd"; and (c) Section 2256 does not define "bestiality" or "sadistic or masochistic abuse." App., *infra*, 8a.

respondents' convictions, however, because he thought that respondents were tried on a strict liability theory. *Id.* at 17a n.*.

REASONS FOR GRANTING THE PETITION

This case involves an exercise by a federal court of the "grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The premise for the court of appeals' holding was its determination that Section 2252 does not require proof that the defendant knew that the materials at issue involved minors. That premise is incorrect. In any event, the court should have read a scienter requirement into the statute to avoid holding it unconstitutional.

1. Section 2252(a)(1) provides that any person who "knowingly transports or ships * * * any visual depiction * * * involv[ing] the use of a minor engaging in sexually explicit conduct" has committed a felony. Section 2252(a)(2) provides that any person who "knowingly receives, or distributes, any visual depicition * * * involv[ing] the use of a minor engaging in sexually explicit conduct" has committed a felony. In our view, the function of the word "knowingly" in subsections (a)(1) and (a)(2) is not limited to modifying the terms "transports," "ships," "receives," and "distributes," as the Ninth Circuit held. Rather, the word also requires knowledge that the item transported, shipped, received, or distributed is a depiction of a minor engaging in sexually explicit conduct. Such a construction is sensible, since there is no apparent reason why Congress would want to ensure that the defendant would be convicted only if he knew that he was transporting, shipping, receiving, or distributing something, but did not care whether the defendant knew that the material

was child pornography. In *Hamling* v. *United States*, 418 U.S. 87 (1974), the Court gave such a common-sense construction to 18 U.S.C. 1461, which makes it a crime to "knowingly use[ ] the mails for the mailing * * * of anything declared by this section * * * to be nonmailable"—*i.e.*, obscene. See 418 U.S. at 119. The Court construed "knowingly" in Section 1461 to require knowledge not only of the mailing but also of the "character and nature of the materials" mailed. 418 U.S. at 123. Thus, although the Ninth Circuit's "interpretation may be correct grammatically, it is not reasonable nor consistent with principles underlying constitutional interpretation of statutes and the courts' obligation to construe statutes to avoid unconstitutionality if possible." *United States* v. *Prytz*, 822 F. Supp. 311, 321 (D.S.C. 1993).

Our reading of the statute also finds strong support in the legislative history. Section 2252 was added to the bill that ultimately became the Protection of Children Against Sexual Exploitation Act of 1977 as the result of an amendment proposed by Senator Roth. During the floor debate on the bill, Senator Percy stated that he assumed that the term "knowingly" in the proposed amendment meant that "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornography depictions or, second, circumstances must be such that he should have had such actual knowledge, and that mere inadvertance [*sic*] or negligence would not alone be enough to render his actions unlawful." 123 Cong. Rec. 33,050 (1977). Senator Roth replied, *ibid.*:

> That is absolutely correct. This amendment, limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.

Senator Percy then asked whether a bookseller could be prosecuted under Section 2252 "if a book or magazine which happened to contain prohibited material is discovered in his shop." 123 Cong. Rec. 33,050 (1977). Senator Roth responded that Section 2252 "creates no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge." 123 Cong. Rec. 33,050 (1977). This exchange between Senators Percy and Roth clearly shows that the word "knowingly" was meant to require knowledge on the defendant's part that he was trafficking in child pornography.[3]

2. Even assuming that the word "knowingly" in Section 2252 does not require proof that the defendant knew that he was dealing with child pornography, it does not follow that the statute defines a strict liability offense in that regard. This Court has recognized that "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand.' " *United States* v. *Bailey*, 444 U.S. 394, 402 (1980), quoting *Morissette* v. *United States*, 342 U.S. 246, 251 (1952). "[T]he failure of Congress explicitly and

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[3] Congress deliberately omitted the use of the word "knowingly" in 18 U.S.C. 2251, which proscribes the production of child pornography and which also was enacted as part of the 1977 Act. The Conference Committee report points out that the word was omitted from Section 2251 "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child." S. Rep. No. 601, 95th Cong., 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977). It follows that, in including the word "knowingly" in Section 2252, Congress must have intended to import such a knowledge requirement.

unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). Instead, some clear indication that Congress intended to create a strict liability offense is necessary "to justify dispensing with an intent requirement." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

In this case, it is clear from the legislative history that Congress did not intend to dispense with a *mens rea* element concerning the minority of the person depicted engaging in sexually explicit acts. Accordingly, it would be wholly appropriate for the courts to infer such an element. Indeed, reading a *mens rea* element into the statute—or, for that matter, construing the language of the statute to import such an element—would be in keeping with the general rule requiring courts to construe statutes "to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward D. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

In determining what mental state is required in the absence of express direction from Congress, the Court has held that it is ordinarily enough if a defendant acts "knowingly." See *Bailey*, 444 U.S. at 408; *United States Gypsum Co.*, 438 U.S. at 444. The general rule requiring that the defendant act with knowledge is appropriately called into play with respect to the minority of the person depicted under Section 2252. To obtain a conviction under Section 2252, the government should be required to prove that the defendant transported, shipped, distributed, or received material that he knew

depicted minors engaging in sexually explicit acts.[4]

3. No other court of appeals has had occasion to consider whether Section 2252 is unconstitutional on the ground that it fails to require proof that the defendant knew that the person depicted engaging in sexually explicit acts is a minor.[5] In other contexts, however, various courts of appeals have concluded or assumed that Section 2252 requires proof of such knowledge. That construction of Section 2252 conflicts with the construction adopted by the Ninth Circuit.

For example, in *United States* v. *Garot*, 801 F.2d 1241 (10th Cir. 1986), the defendant argued that child pornography found in his bedroom should not have been admitted as extrinsic evidence at his trial for receiving

[4] To establish knowledge, it is generally enough that the government show that the defendant "willfully blinded" himself to facts showing that he was dealing with proscribed materials. See, *e.g.*, *United States* v. *Picciandra*, 788 F.2d 39, 46-47 (1st Cir.), cert. denied, 479 U.S. 847 (1986); *United States* v. *Graham*, 739 F.2d 351, 352-353 (8th Cir. 1984); *United States* v. *Burns*, 683 F.2d 1056, 1059 (7th Cir. 1982); see also 123 Cong. Rec. 33,050 (1977) (Sen. Roth stated that Section 2252 "creates no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge"). For that reason, it is not likely to make a difference in many cases whether the Court adopts a "knowledge" standard or a "recklessness" standard, the standard that Judge Kozinski stated was appropriate.

[5] One district court has considered the issue, however, and explicitly rejected the Ninth Circuit's position. *United States* v. *Prytz*, 822 F. Supp. at 320-321. After noting that "[t]he Ninth Circuit apparently stands alone in its reasoning that § 2252 is unconstitutional," the court said that it "joins the majority and finds that the language of § 2252 imposes a scienter element as to the nature of the proscribed visual depictions" such that "Section 2252(a)(2) requires that the defendant 'knowingly' receive or reproduce child pornography." *Id.* at 321.

other materials in violation of Section 2252. The court of appeals held that the evidence was properly admitted because it was "vital to proof of [the defendant's] knowledge of the contents" of the material he received. 801 F.2d at 1247. The court explained that the exhibits were "particularly relevant to proof of *scienter* * * *, because they show previous interest in child pornography." *Ibid.*

In *United States* v. *Brown*, 862 F.2d 1033 (3d Cir. 1988), the defendant ordered three child pornography videos, but was sent a different video instead. Since the defendant knew the video he received was child pornography, the court deemed it irrelevant that he had not ordered that film, because "the recipient need only know that the material he receives is child pornography." *Id.* at 1036. The court further had "no difficulty with the admission into evidence of the child pornography" found in the defendant's home, which was admitted under Fed. R. Evid. 404(b) to show proof of intent or absence of mistake. 862 F.2d at 1038-1039 n.6. Similarly, in *United States* v. *Marchant*, 803 F.2d 174 (5th Cir. 1986), the court of appeals rejected the defendant's claim that he had ordered adult pornography and was sent child pornography by mistake, noting the numerous "Lolita" magazines found in the defendant's possession. *Id.* at 177.

In *United States* v. *Duncan*, 896 F.2d 271 (7th Cir. 1990), the defendant challenged his convictions for violating Section 2252 on the ground that he did not know that the photographs he had ordered depicted children (rather than adults) engaging in sexually explicit acts. In rejecting that claim, the court of appeals did not question the validity of the defendant's premise that Section 2252 requires knowledge on his part that the photographs were child pornography. Rather, the court

found that the brochure from which the defendant had ordered the photographs was "sufficiently clear and sufficiently explicit to make anyone, let alone [the defendant], a collector of this material and a college professor assumed to be above average in intelligence, aware of the fact that child pornography was being offered." 896 F.2d at 278.

The facts of this case showed that respondent Gottesman was well aware that he was selling child pornography. Accordingly, the court of appeals should have affirmed respondents' convictions.[6] Moreover, as a result of the court's decision, the federal government may not bring prosecutions under Section 2252 in the Ninth Circuit. That Circuit includes Los Angeles and Las Vegas, where a large amount of child pornography has been produced, and from which it is shipped and distributed. Furthermore, the decision will inevitably lead to the filing of numerous collateral challenges to convictions under Section 2252, since anyone who was convicted under Section 2252 now has support for the argument that his conviction is invalid.

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[6] Judge Kozinski was incorrect in finding that respondents were "tried under a theory which imposed strict liability as to the age of the minor." App., *infra*, 17a n.*. To the contrary, the district court held that "the [g]overnment was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age," and found as a fact that respondent Gottesman "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at 39a ¶ 7, 41a ¶ 2. Although the district court stated on remand following the Ninth Circuit's decision in *Thomas* that the government did not have to prove that Gottesman knew that Lords was under age, *id.* at 36a ¶ 2, it did not retract its finding of fact, which is amply supported by the record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 89-50556 and 89-50562

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

X-CITEMENT VIDEO, INC., DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RUBIN GOTTESMAN, DEFENDANT-APPELLANT

Argued and Submitted March 5, 1992.
Decided Dec. 16, 1992.

Appeal from the United States District Court
for the Central District of California

Before CANBY, KOZINSKI and FERNANDEZ, Circuit Judges.

CANBY, Circuit Judge:

Defendant Rubin Gottesman appeals his conviction, after a bench trial, for violating the Protection of Children Against Sexual Exploitation Act of 1977 ("Act"), 18 U.S.C. § 2251 *et seq.* (1988). Gottesman was convicted of violating sections 2252(a)(1) and (a)(2) of the Act, which prohibit the distribution, receipt, or shipping of child pornography. Gottesman challenges the Act as unconstitutional, both on its face and as applied. We conclude that the Act is unconstitutional on its face and, therefore, reverse.

FACTUAL BACKGROUND

In 1986 and 1987, an undercover police officer contacted Gottesman, the operator of X-Citement Video, Inc., and expressed interest in buying pornographic videotapes featuring one Traci Lords. The officer stated that he wanted tapes that Lords had made when she was under the age of 18. Gottesman eventually sold two sets of such tapes: the first was a box of 49 tapes that he sold directly to the police officer; the second was a box of 8 tapes that Gottesman sold to the police officer and sent (per the police officer's instructions) to Hawaii.

A federal grand jury indicted Gottesman for distributing, shipping, and conspiring to distribute and ship child pornography in violation of 18 U.S.C. § 2252. After a bench trial, Gottesman was convicted on these counts; the district court sentenced him to 12 months incarceration and ordered him to pay a $100,000 fine.

After he had filed a notice of appeal to this court, Gottesman requested a remand to the district court for reconsideration in light of *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S.

826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990), which we granted. Gottesman then asserted before the district court, first, that *Thomas* had ruled that section 2252 lacked a requirement that a defendant know that he is distributing or shipping child pornography, and, second, that, as construed, section 2252 on its face violates the First and Fifth Amendments to the U.S. Constitution. The district court rejected these arguments and upheld the constitutionality of section 2252.

On appeal, Gotteman contends that Section 2256 of the Act[1] is unconstitutional on its face because it is

[1] Section 2256 provides that:

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape;

(6) "computer" has the meaning given that term in section 1030 of this title; and

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.

vague and overbroad; section 2252 of the Act[2] is unconstitutional on its face because it does not require scienter;[3] and the Act, as applied, violates the First and Fifth Amendments because the tapes at issue are not child pornography. We reject the challenges to section 2256 but agree that section 2252 is

[2]The relevant portions of Section 2252 provide that:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * *

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

[3] Gottesman also argues that the indictment was insufficient because it did not allege scienter. In light of our ruling on the constitutionality of the Act, we do not address this issue.

unconstitutional on its face, we do not reach Gottesman's argument about the Act as applied.

DISCUSSION

I. *Does Section 2256 Render the Act Unconstitutionally Vague and Overbroad?*

A. Is the Act Unconstitutionally Overbroad Because it Raises the Statutory Age of Majority from 16 to 18?

Gottesman asserts that section 2256[4] of the Act—its definitional section—is facially unconstitutional because it renders the Act applicable to depictions of those under the age of 18, whereas the statute upheld in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), set the age of majority at 16. *See Ferber,* 458 U.S. at 774, 102 S.Ct. at 3363 (rejecting constitutional challenges to statute prohibiting promotion or distribution of sexual performances by children under the age of 16). Gottesman argues that adding two years to the age of majority renders the Act unconstitutionally overbroad. He contends that it is far more difficult to determine when a person is under 18 than it is to determine when he or she is under 16. The result, according to Gottesman, is that distribution of sexually explicit material becomes such a hazardous profession that its practitioners will refuse to handle materials involving persons anywhere near the age of 18, thus restricting protected expression involving, for example, 23- or 25-year-olds.

[4] Gottesman refers to this section as § 2255. The difference is inconsequential: Section 2255 was recently renumbered as § 2256, and they are otherwise identical.

The Supreme Court stated in *Ferber* that it would invalidate a statute for overbreadth "only as a last resort.'. . . [T]he overbreadth involved [must] be 'substantial' before the statute involved will be invalidated on its face." *Ferber,* 458 U.S. at 769, 102 S.Ct. at 3361 (citation omitted). Although Gottesman's argument is not without some force, we see no basis for concluding that any overbreadth here is sufficiently greater than that attending a 16-year age line to compel a different result. Indeed, we would not lightly hold that the Constitution disables our society from protecting those members it has traditionally considered to be entitled to special protections—minors. Gottesman merely quotes a district court case discussing the Act's raising of the age of majority from 16 to 18, *United States v. Kantor,* 677 F.Supp. 1421 (C.D.Cal.1987), *vacated, mandate granted, United States v. United States District Court for the Central District of California,* 858 F.2d 534 (9th Cir. 1988), and a series of Supreme Court cases that permit "adult" treatment of 16- and 17-year-olds. *See, e.g., Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (permitting capital punishment for 16- and 17-year-olds). With respect to the former, *Kantor* did state that the Act seemed overbroad, but it also refused to strike down the statute on its face, in light of *Ferber.* With respect to the Supreme Court cases, they merely permit, rather than require, adult treatment of 16- and 17-year-olds. Moreover, they indicate nothing about the substantiality (or lack thereof) of the overbreadth of section 2256. Thus, Gottesman's arguments are far from sufficient to overcome the presumption against invalidating a statute on its face for overbreadth.

B. Does Section 2256 Render the Act Unconstitutionally Overbroad or Vague Because it Substitutes "Lascivious" for "Lewd"?

Gottesman contends that section 2256 is overbroad and vague because Congress replaced "lewd" with "lascivious" in defining illegal exhibition of the genitals of children. *See* 18 U.S.C. § 2256(2)(E). In so arguing, he ignores *United States v. Wiegand,* 812 F.2d 1239 (9th Cir.), *cert. denied,* 484 U.S. 856, 108 S.Ct. 164, 98 L.Ed.2d 118 (1987), in which we rejected a similar argument, stating that "[l]ascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in *Miller v. California* [413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] and in *Ferber.*" *Wiegand,* 812 F.2d at 1243 (citations omitted). We adhere to the view expressed in *Wiegand.*

C. Does Section 2256 Render the Act Unconstitutionally Overbroad or Vague Because it Prohibits Actual or Simulated Bestiality and Sadistic or Masochistic Abuse?

Gotteman asserts that section 2256 is overbroad and vague because it includes among the covered acts, without further definition, actual or simulated bestiality and sadistic or masochistic abuse. 18 U.S.C. § 2256(2). This argument was essentially answered in *Ferber,* which upheld the constitutionality of a similar statute. The relevant section of the statute at issue in *Ferber* defined the prohibited sexual conduct as " 'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.' " 458 U.S. at 751, 102 S.Ct. at 3351.

Gottesman focuses on three differences between section 2256 and the statute in *Ferber*: First, he argues that section 2256's prohibition of "simulated" acts renders it overbroad and vague. The statute in *Ferber* also prohibited "simulated" acts, however, and the structure of the sentence suggests that "simulated" modified all the acts on the list. Thus, there is no meaningful distinction between section 2256 and the *Ferber* statute in this regard. Second, Gottesman focuses on section 2256(2)(D)'s alleged inclusion of "sadistic or masochistic; abuse." The semicolon before "abuse" is a typographical error in the unofficial code, however; the official version of section 2256(2)(D) states "sadistic or masochistic abuse." *Compare* 18 U.S.C. § 2256(2)(D) (1988) *with* 18 U.S.C.A. § 2256(2)(D) (West Supp. 1992). The only difference between section 2256 and the *Ferber* statute, therefore, is the former's replacement of "sado-masochistic abuse" with "sadistic or masochistic abuse." The two terms are indistinguishable. The final difference that Gottesman cites is that the *Ferber* statute prohibited "sexual bestiality," whereas section 2256 refers only to "bestiality." Gottesman suggests that, under section 2256, "bestiality" could be read to encompass its entire dictionary definition, so that it would also prohibit, e.g., "the display, gratification, or an instance of bestial traits or impulses." *Webster's International Dictionary* (3rd ed. 1966). In context, however, such a reading would not be justified; "bestiality" is listed as a subcategory of "sexually explicit conduct." The term can hardly be interpreted to mean "acting beastly"; properly construed, the term is no different from *Ferber's* "sexual bestiality."

Thus, we reject all of Gottesman's vagueness and overbreadth challenges to the Act.

II. *Does Section 2252 Render the Act Unconstitutional Because it Does Not Require Proof of Scienter that the Materials Distributed Are Child Pornography?*

Gottesman's other facial challenge to the Act is that section 2252—the section prohibiting, *inter alia*, the distribution or receipt of child pornography—violates the guarantee of free speech under the First Amendment and the guarantee of due process under the Fifth Amendment because it does not require that the prosecution demonstrate the defendant's knowledge of the age of the performers. Gottesman argues that: (1) section 2252 does not include a scienter requirement regarding the minority of the performers; and (2) the lack of a scienter requirement violates the First and Fifth Amendments to the Constitution.

A. What Showing of Scienter Does Section 2252 Require?

The main point of contention between the parties is over the scienter requirement of section 2252. Gottesman contends that section 2252 does not require knowledge of the minority of the performers, whereas the government argues that section 2252 requires knowledge of "the nature and character of the material." The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers. Of course, it would make no difference under any construction of the statute if the defendant did not know precisely whether the underage performer was age 6, 7 or 8. What the government seems to be saying in its brief, however, is that the statute does not even require

that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

We ruled on the question of the scienter required by the Act in *Thomas*, in which the defendant was accused of violating section 2252. Thomas, like Gottesman in the instant case, argued that section 2252 requires knowledge of the minority of the performer, and that, therefore, the indictment was insufficient because it failed to allege that Thomas knew that the pornography he transported depicted a minor. After setting forth section 2252, we stated that

> In subsection 1, "knowingly" modifies only "transports or ships." In subsection 2, "knowingly" modifies only "receives." *The section [2252], therefore, does not require that Thomas knew that the pornography he transported, mailed, and received involved a minor. The section requires only that Thomas knowingly transported and received the material.*

893 F.2d at 1070 (emphasis added). Thus, *Thomas* held that section 2252 does not require knowledge that the material involves a minor. In fact, *Thomas* indicates that section 2252 does not require any knowledge of the contents of the material; the only scienter requirement of section 2252 is the defendant's knowledge that he mailed the material.

The government does not attempt to distinguish *Thomas*, but rather relies on *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989). In *Moncini*, the defendant argued that section 2252 requires the government to prove that a defendant knew that mailing child pornography was illegal. We rejected this argument, stating that "[s]ection 2252(a) requires that the government prove that the defendant had knowledge of the nature of the contents of the visual depictions and that the depictions were to be transported or shipped," but that no more was required. *Id.* at 404. Thus, we held that section 2252 did not require knowledge of the illegality of mailing child pornography. *See also United States v. Brown*, 862 F.2d 1033, 1036 (3rd Cir. 1988) (under section 2252 "recipient need only know that the material he receives is child pornography").

The problem with the government's reliance on *Moncini* is that its statement that knowledge of the contents is required is dictum. In *Moncini*, the question before us was whether section 2252 requires knowledge of the illegality of the mailings; the statement regarding knowledge of the contents was unnecessary to our ruling. In *Thomas*, on the other hand, the defendant squarely raised the question of whether section 2252 requires knowledge that the performers are under the age of 18. Our statement that section 2252 requires no such knowledge constituted part of our ruling. Thus, *Thomas* is the only precedent from this circuit on the question of whether section 2252 requires scienter of the minority of the performers. We are bound by its conclusion that section 2252 contains no such requirement.

B. What Level of Scienter Does the Constitution Require?

Gottesman contends—and the government does not dispute—that a statute prohibiting the distribution of printed or taped materials that does not require some knowledge of the contents of the material violates the First and Fifth Amendments of the U.S.

Constitution. The Supreme Court so ruled in *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). In *Smith,* the Court held that the First Amendment prohibits prosecution of a book distributor for possession of an obscene book unless the distributor has "knowledge of the contents of the book." 361 U.S. at 153, 80 S.Ct. at 218. *See Ferber,* 458 U.S. at 765, 102 S.Ct. at 3358 ("As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."); *see also Osborne v. Ohio,* 495 U.S. 103, 115, 110 S.Ct. 1691, 1699, 109 L.Ed.2d 98 (1990) (noting "the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter").

The *Smith* opinion did not delineate the level of scienter that the Constitution requires. In *Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) and *Ripplinger v. Collins,* 868 F.2d 1043 (9th Cir. 1989), however, the constitutional requirements were clarified somewhat. In *Hamling,* a defendant convicted of distributing obscene material argued that the government was required to prove that he knew that the material was obscene. The Supreme Court, in rejecting this argument, stated that: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling,* 418 U.S. at 123, 94 S.Ct. at 2910. We applied *Hamling* in *Ripplinger,* finding a statutory definition unconstitutional on its face because it did not require actual knowledge of the contents of the pornographic material. In so ruling, we indicated that a statute must require knowledge of the character of the materials

in order to pass constitutional muster. *Ripplinger,* 868 F.2d at 1056.

In purporting to apply these principles here, the government once again skates a very fine line in its brief. It concedes that, to be constitutional, the statute must require knowledge of the nature and character of the material, and it sometimes formulates this requirement as knowledge that the material is "child pornography." On the other hand, it appears to resist a requirement of proof that the defendant know that one or more performers were underage. It emphasizes that the Constitution does not require knowledge by the defendant of the actual age of the underage performer. Of course that must be true. The question, however, is whether it requires knowledge that one or more performers was under age 18. In at least part of its argument, the government seems to suggest that there is no such requirement:

> Thus, the scienter required by the child pornography statutes is analogous to that required for obscenity convictions—general knowledge of the nature of the contents of the materials, not knowledge of the specific age of the minor. *See also United States v. Thomas,* 893 F.2d 1066, 1070 (9th Cir. 1990) (section 2252(a) does not require proof that defendant knew that pornography involved a minor). . . .

Government's brief, p. 17. At oral argument, the government moved away somewhat from this perch and conceded that the statute would have severe constitutional problems if it did not include a requirement of knowledge that at least one performer engaged in the specified sexually explicit acts was under 18 years of age.

Whatever the government's position, we conclude that the constitutional minimum requirement of scienter for the Act's proscription of transporting or receiving child pornography is knowledge that at least one of the performers is under age 18. It is true that, in *Hamling*, it was not necessary that the violator know that the material he was distributing was obscene. But the Supreme Court's point was that it was not essential that the violator know the *legal* status of the materials; he could not "avoid prosecution by simply claiming that he had not brushed up on the law." *Hamling*, 418 U.S. at 123, 94 S.Ct. at 2911. The question before us does not concern the defendant's requisite knowledge of the law; it concerns his knowledge of a particular fact—the underage of the performer.

Our decision in *United States v. United States District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988), is highly instructive. There we dealt with charges under section 2251(a) of the Act against producers of films also featuring the redoubtable Traci Lords; the issue was whether the producers were entitled to an affirmative defense that they were deceived by Lords into believing that she was an adult. We held that the First Amendment required that provision for such a defense be engrafted onto the Act. *Id.* at 538-44. We declined to hold, however, that the Constitution required knowledge of the minority of the performer to be an element of the offense. Our reasons for so declining are most relevant here:

> Defendants would have us go farther and hold that the first amendment requires the government to prove scienter as part of its case. They rely on the Supreme Court cases holding that the

> government must carry such a burden in cases involving booksellers and other downstream distributors. *See, e.g., Hamling*, 418 U.S. at 123, 94 S.Ct. at 2910. We do not view these cases as controlling here. Those who arrange for minors to appear in sexually explicit materials are in a far different position from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape. While it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of the actors with whom they have had no direct contact, *see Smith*, 361 U.S. at 153-54, 80 S.Ct. at 218-19, producers are in a position to know or learn the ages of their employees. We note that several states have taken this approach. . . .

Id. at 543-44 n. 6. These considerations concerning distributors or receivers are directly applicable here, and we find them compelling. Section 2252 potentially applies to all kinds of recipients or distributors of videotapes and magazines. To render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the distributor's or recipient's knowledge, would be to create precisely the kind of chilling effect condemned by *Smith*. That we cannot do consistently with the First Amendment as the Supreme Court has interpreted it.

We conclude, therefore, that the First Amendment mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require knowledge of the minority of the performers as an element of the crime it defines. Section 2252, as

authoritatively construed by *Thomas*, does not so require.

The question then arises whether, in the face of *Thomas*, we could construe section 2252 so as to save its constitutionality. In *District Court*, we engrafted an affirmative defense onto section 2251(a) in order to save it. Despite that example, we do not feel free to follow an analogous course here. First, it comes closer to judicial rewriting of a statute to engraft onto it an element of the crime than it does to recognize an affirmative defense, of a type that often exists without being specified in the statute defining the crime. *See District Court*, 858 F.2d at 542. Second, *Thomas* decided the precise question whether knowledge of the performer's underage was an element of 2252, and it cited *District Court* for the analogous proposition that scienter was not an element of section 2251. *Thomas*, then, was decided in full knowledge of *District Court* and its rationale. *Thomas* nevertheless ruled squarely that scienter of the minority of the performer was not an element of the crime defined by section 2252. Not sitting as an en banc court, we regard ourselves as bound by *Thomas*'s interpretation.

CONCLUSION

In summary, then, we conclude that the First Amendment to the United States Constitution mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require as an element knowledge of the minority of at least one of the performers who engage in or portray the specified conduct. Section 2252, as authoritatively construed by *Thomas*, does not so require. As a result, section

2252 is unconstitutional on its face. Gottesman's conviction therefore cannot stand.

REVERSED.

KOZINSKI, Circuit Judge, dissenting in part.*

What makes this case hard is that most of the materials defendant distributes are protected by the First Amendment. The thought that someone in his position might be convicted, despite an innocent mind, because of a short scene in one videotape among the thousands he carries in stock, should give pause to anyone concerned about free speech. I therefore agree with my colleagues that a child pornography statute must contain a mens rea requirement. But I do not agree that Gottesman must have *known* the videos he sold depicted child pornography; recklessness on his part would have sufficed. Moreover, under our traditional rules of construction, we can read a recklessness mental state into the statute, to bring it in line with the Constitution. Indeed, we have a duty to do so.

I

Part II(B) of the majority opinion answers the question: "What level of scienter does the Constitution require?" It concludes that a defendant in a child pornography case must be proven to have "knowledge

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* Strictly speaking, this is a concurrence, because I too would reverse Gottesman's conviction on the ground that he was tried under a theory which imposed strict liability as to the age of the minor. I style it a dissent, however, because I would avoid striking down an Act of Congress, and would remand for a retrial under a statute properly narrowed to comply with constitutional norms.

of the minority of at least one of the performers." Maj. op. at 1292. In reaching this conclusion, the majority relies on *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), which holds that, under a child pornography statute, "[a]s with obscenity laws, criminal responsibility may not be imposed without *some* element of scienter." *Id.* at 765, 102 S.Ct. at 3358 (emphasis added). But *Ferber* did not say what level of scienter is sufficient in a child pornography case, whether it be purposefulness, knowledge, recklessness, negligence, or something else altogether.

The Supreme Court answered this question eight years later in *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). *Osborne* upheld a statute that outlawed the possession of child pornography where the defendant either knew the performers were underage or was at least reckless as to this fact. The Court considered Osborne's argument that the statute was "unconstitutionally overbroad because it applied in instances where viewers or possessors lack scienter," and rejected it because "[a]lthough [the challenged statute] does not specify a mental state, Ohio law provides that recklessness is the appropriate *mens rea* where a statute neither specifies culpability nor plainly indicates a purpose to impose strict liability." *Id.* at 113 n. 9, 110 S.Ct. at 1698 n. 9 (internal quotation marks omitted). Recklessness, the Court held, "*plainly satisfie[d]* the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." *Id.* at 115, 110 S.Ct. at 1699 (emphasis added). The mens rea issue was squarely raised and squarely resolved. I don't understand how the majority can fail

to follow—or even address—this passage from *Osborne*.[1]

The majority is led astray by *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), and *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989)—all adult obscenity cases. *Ferber* did indeed refer to the scienter requirement of obscenity cases such as these when announcing a scienter requirement in child pornography cases, but only by way of analogy. 458 U.S. at 765, 102 S.Ct. at 3358. In fact, *Ferber* blazed a trail for child pornography quite separate from that for obscenity. This distinction is rooted in the government's greater power to prohibit child pornography. The *Ferber* Court painfully catalogued the harms sexual exploitation inflicts on children, demonstrating the surpassing importance of the government's interests in this area. *Id.* at 756-62, 102 S.Ct. at 3354-57;[2] *accord Osborne*,

[1] *Osborne* might be distinguished because it is a possession case, not a distribution case. However, this distinction cuts entirely the wrong way for the defendant here. Under *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), the state has more latitude to proscribe the distribution of materials not protected by the First Amendment than it does when prohibiting their private possession. *Id.* at 568, 89 S.Ct. at 1250 ("States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.") If recklessness was scienter enough to convict Osborne for his private possession of child pornography, it is certainly enough to convict Gottesman for distributing it.

[2] The Court recognized that "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," 458 U.S. at 759, 102 S.Ct. at 3355; that "the advertising and selling of child pornography provide an economic motive for and are thus an integral

495 U.S. at 109-10, 110 S.Ct. at 1696-97. Because these interests provide a far more compelling basis for prohibiting child pornography than adult pornography,[3] the Court in *Ferber* cast child pornography

part of the production of such materials, an activity illegal throughout the Nation," *id.* at 761, 102 S.Ct. at 3357; and that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis," *id.* at 762, 102 S.Ct. at 3357. Noting the strength of the government interest in "safeguarding the physical and psychological well-being of . . . minor[s]," *id.* at 756-57, 102 S.Ct. at 3354, the Court said it would "not second-guess [New York's] legislative judgment . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," *id.* at 757-58, 102 S.Ct. at 3355.

The scars of child pornography can last a lifetime. As adults, those exploited as minors may be under pressure to rationalize their conduct, even though they bear no moral responsibility for it. Consider the words of the 24-year old Traci Lords: "I don't think I did anything that special or weird or different. The only difference was that I did it on video. Every teenage cheerleader runs around, screws half the football team, and takes drugs. The major difference is that the evidence of my doing it existed on the shelves of video stores." Michael Kaplan, *The House of Lords,* Movieline, Jan./Feb. 1993, at 71, 72.

[3] Pornography featuring adults can be regulated to protect unwilling recipients and juveniles from offensive exposure, *Miller v. California*, 413 U.S. 15, 18-19, 93 S.Ct. 2607, 2611-12, 37 L.Ed.2d 419 (1973), and to vindicate society's interest in order and morality, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973). Because these interests are weaker than that in protecting children from appearing in sexually explicit materials, the state may prohibit non-obscene child pornography but only obscene adult pornography. *Miller*, 413 U.S. at 23, 93 S.Ct. at 2614.

Of course, many have argued—and many more have disagreed with them—that, just as the child pornography trade harms children, adult pornography harms both the people who appear in the materials, and the people who are hurt by the attitudes these materials foster. But society's interest in avoiding these harms has been held to not justify restricting speech. *See American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986). *But see* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L.Rev. 1 (1985); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589. *See generally* Gerald Gunther, *Constitutional Law* 1125-26 & n. 1 (12th (wheeled) ed. 1991) (as usual, most of the action is in the footnote).

outside the umbrella of the First Amendment, without regard to whether the materials in question were obscene. 458 U.S. at 764, 102 S.Ct. at 3358.

All this means that obscenity precedents just don't work in the child pornography context. For instance, private possession of child pornography can be criminalized, *Osborne*, 495 U.S. at 108, 110 S.Ct. at 1695, while private possession of obscene material cannot, *Stanley v. Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969).[4] Similarly, child pornography can be barred even if it doesn't appeal to prurient interests, even if it isn't patently offensive and even without considering the work as a whole. *Ferber*, 458 U.S. at 764, 102 S.Ct. at 3358. *But see Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Justices Brennan and Marshall, consistent dissenters in the court's major obscenity cases, concurred in *Ferber*. *Compare Miller*, 413 U.S. at 47, 93 S.Ct. at 2627 (Brennan, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting), *with Ferber*, 458 U.S. at 775, 102 S.Ct. at 3364 (Brennan, J., concurring).

[4] "[W]e find this case distinct from *Stanley* because the interest underlying child pornography prohibitions far exceed the interest justifying the Georgia law at issue in *Stanley*." *Osborne*, 495 U.S. at 108, 110 S.Ct. at 1695.

Just as telling is the Court's more relaxed approach to scienter in child pornography cases. *Osborne*'s one short paragraph in the text, 495 U.S. at 115, 110 S.Ct. at 1699, and two equally laconic sentences in an omnibus footnote disposing of two unrelated claims, *id.* at 112 n. 9, 110 S.Ct. at 1698 n. 9, stand in stark contrast to other First Amendment cases where the Court agonized at length over the scienter issue. *See, e.g., Smith,* 361 U.S. at 150-55, 80 S.Ct. at 217-20 (scienter required for obscenity prosecution); *Hamling,* 418 U.S. at 118-24, 94 S.Ct. at 2908-11 (knowledge of nature and character of materials rather than knowledge of their legal status as obscenity is proper mental state for obscenity prosecution); *see also New York Times Co. v. Sullivan,* 376 U.S. 254, 279-83, 84 S.Ct. 710, 725-28, 11 L.Ed.2d 686 (1964) (announcing actual malice requirement in defamation action by public figure); *Masson v. New Yorker Magazine, Inc.,* —— U.S. ——, —— - ——, 111 S.Ct 2419, 2431-33, 115 L.Ed.2d 447 (1991) (fleshing out actual malice standard as applied to defamatory statements in the form of inaccurate direct quotations).

These distinctions bear out the original observation in *Ferber* that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" than in regulation of obscenity. They cast serious doubt on any analysis that relies on obscenity cases in the child pornography context. *Id.* 458 U.S. at 756, 102 S.Ct. at 3354.[5] *Osborne* is the relevant

[5] For a discussion of the doctrinal isolation of child pornography cases and the need for separate standards to decide them, see Frederick Schauer, *Codifying the First Amendment: New York v. Ferber,* 1982 Sup.Ct.Rev. 285, 287-88 & 308-09:

> [*Ferber* created] yet another comparatively distinct area of First Amendment doctrine. The rules relating to child pornography now take their place alongside the equally distinct rules relating to obscenity, defamation, advocacy of illegal conduct, invasion of privacy, fighting words, symbolic speech, and offensive speech. Moreover, each of these areas contains its own corpus of subrules, principles, categories, qualifications, and exceptions. . . . When we take all this together it becomes clear that the First Amendment is becoming increasingly intricate. . . .

Id. at 308-09. Schauer generally applauded the Court's segregation of child pornography and obscenity into more distinct categories for purposes of First Amendment scrutiny. However, he presciently flagged as a potential pitfall precisely the kind of mistake the majority makes here: "Extreme subdivision of the First Amendment magnifies the risk that an increasingly complex body of doctrine, even if theoretically sound, will be beyond the interpretative capacities of those who must follow the Supreme Court's lead—primarily lower court judges, legislatures, and prosecutors." *Id.* at 288.

authority and *Osborne* holds that recklessness is a sufficient mental state to support a conviction in a child pornography case.

II

A. All of this would be beside the point if, as the majority suggests, *United States v. Thomas,* 893 F.2d 1066 (9th Cir.), *cert. denied,* 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990), conclusively held that 18 U.S.C. § 2252(a) is a strict liability statute. But *Thomas* addressed only a very narrow question: Does section 2252(a), *as a matter of simple statutory construction,* require the government to prove the defendant knew the materials contained child pornography? All *Thomas* tells us is that the word "knowingly" in the statute does not apply to the age of the depicted children. 893 F.2d at 1070. This is not much more than we would learn by reading the statute

ourselves. The ruling neither considered nor excluded the possibility that a lower level of scienter, like recklessness, might apply as a matter of *constitutional* interpretation.[6]

The defendant in *Thomas* made no constitutional argument; the *Thomas* court said nothing about the First Amendment. Indeed, had *Thomas* addressed the constitutional issue, it would have been bound by both the Supreme Court's and our own holdings that child pornography can't be a strict liability offense. *Ferber*, 458 U.S. at 765, 102 S.Ct. at 3358; *United States v. United States District Court*, 858 F.2d 534, 540 (9th Cir. 1988) ("*Kantor*") (interpreting a different section of the same statute involved here and in *Thomas*). Had *Thomas* considered the First Amend-

[6] My colleagues may be distracted by *Thomas* because of an unfortunate accident of nomenclature. Both statutory construction and constitutional narrowing are sometimes referred to as interpretation. They are, in fact, very different animals. Statutory interpretation is an attempt to divine the meaning of the statute as passed by Congress and signed by the President. Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 652-54, 104 S.Ct. 3262, 3268-70, 82 L.Ed.2d 487 (1984). In performing the former task we may not add anything to the statute that is not already there (or ignore anything that is); in performing the latter function, we must do precisely that. In pure interpretation, we must carry out the legislative will. In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) (courts should construe statutes to avoid unconstitutionality "unless such construction is plainly contrary to the intent of Congress").

ment, it would have had to either follow *Kantor* and read a scienter requirement into the statute, or strike the statute down altogether.

Of course, there is absolutely nothing wrong with the *Thomas* decision. We generally deal only with arguments raised by the parties. *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988). If the defendant did not raise a First Amendment defense, the panel had no obligation to raise it for him. But surely *Thomas*'s failure to decide the constitutional question—how to interpret section 2252(a) in light of the First Amendment—cannot foreclose us from deciding that question now that it's been squarely put to us. *See, e.g., United States v. Vroman*, 975 F.2d 669, 671-72 (9th Cir. 1992).

The majority's supine willingness to be bound by a panel that decided a question different from that posed to us leads to truly paradoxical results. Because of an accident of timing—because the first defendant to challenge section 2252(a) neglected to raise a First Amendment claim—section 2252(a) turns out to be unconstitutional. *See* maj. op. at 1291-92. A neighboring section, 2251(a), is saved because the first case to consider it did present a First Amendment challenge, giving us the opportunity to narrow it. *See Kantor*, 858 F.2d at 542-44.

Our jurisprudence cannot evolve in such a haphazard fashion. Under the majority's reasoning *no* court would be able [to] save section 2252(a). Not *Thomas* because they had no reason to confront the issue; and not we today because we are bound by *Thomas*. Our prudential rule of avoiding unnecessary consideration of issues not put before us by the parties turns into a trap. Giving preclusive force to the never-

contemplated emanations from *Thomas* undermines our duty to save the statute if we can.[7]

B. Because *Thomas* cannot be read to foreclose an issue that it had no reason to reach, it is our job to

[7] First Amendment challenges to statutes often arise long after the statute is first applied. Title VII, for instance, has for over a decade restricted harassing speech in the workplace, but the first reported federal case involving a First Amendment defense was decided only in 1991. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 900-01 (11th Cir. 1982); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1534-37 (M.D.Fla. 1991); *see generally* Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 592-600 (1992). Because First Amendment defenses were rarely raised, harassment law evolved with little concern for free speech, and some workplace harassment cases seem suspect on First Amendment grounds. *See, e.g., Snell v. Suffolk County*, 611 F.Supp. 521, 531-32 (E.D.N.Y. 1985) (injunction banning "any racial, ethnic, or religious slurs . . . in the form of 'jokes,' 'jests,' or otherwise," whether or not severe or pervasive enough to create a hostile work environment), *aff'd*, 782 F.2d 1094 (2d Cir. 1986); *Tunis v. Corning Glass Works*, 747 F.Supp. 951, 955, 959 (S.D.N.Y. 1990) (use of gender-based terms like "foreman" or "draftsman" could be harassment, *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991). For an excellent discussion of the issue, see Eugene Volokh, Note, *Freedom of Speech and Workplace Harassment*, 39 UCLA L.Rev. 1791, 1800-07 (1992) (describing other cases). *See also* Lindemann & Kadue, *supra;* Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 Ohio St.L.J. 481 (1991); Marcy Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L.Rev. 1 (1990).

We may one day conclude that some workplace speech—for instance, a bigoted political poster—is protected even if it creates a hostile work environment. But if this happens, surely the right answer is to save as much of workplace harassment law as we can, not to throw it all out just because a few courts, not faced with First Amendment defenses, may have read it too broadly.

confront it today: Can we save 2252(a) by reading into it a requirement that defendant here acted recklessly as to the age the minor?[8] Not only can we, we must. *See, e.g., Dennis v. United States*, 341 U.S. 494, 499-501, 71 S.Ct. 857, 862-63, 95 L.Ed. 1137 (1950) (plurality opinion).

Statutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations. *See Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434 (1985); *United States v. O'Mara*, 963 F.2d 1288, 1292-96 (9th Cir. 1992) (Kozinski, J., concurring). In *Kantor*, we grafted an affirmative defense of reasonable mistake of age onto the statute, something far more exotic than just reading in a mental state element. Having determined under *Ferber* and *Osborne* that the federal child pornography statute is constitutional if only it includes a mens rea requirement, I would pose the same question here as we did in *Kantor*: Would Congress, if given the choice, have passed section 2252(a) with a recklessness requirement as to the age of the minor, or not passed it at all? *Kantor*, 858 F.2d at 542; *see also Regan v. Time, Inc.*,

[8] Which mental state to choose is not entirely clear. In *Kantor*, we stated that "Congress may take steps to punish severely those who knowingly subject minors to sexual exploitation, and even those who commit such abuse recklessly or negligently. . . ." 858 F.2d at 540. We know, after *Osborne*, that recklessness is sufficient, but it is not at all clear that a lesser state of mind, such as negligence, would not suffice to save the statute. *Cf.* Robert R. Strang, Note, *"She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth*, 90 Colum.L.Rev. 1779, 1801-02 (1990) (providing mistake of age defense to section 2252 prosecution satisfies First Amendment scienter requirement).

468 U.S. 641, 653, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984) (plurality); *id.* at 691-92, 104 S.Ct. at 3289-90 (Powell, J., concurring). To pose the question is to answer it. Congress quite clearly viewed child pornography as an extremely grave problem, one deserving sweeping prohibitions and strict sanctions. It is inconceivable that, given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter. In drafting the statute, Congress did delete a knowledge requirement, but I do not read this as precluding any and all scienter requirements. Indeed, "we are quite sure that the policies Congress sought to advance by enacting [section 2252(a)] can be effectuated even" after we read a mental state element of recklessness into the statute. *Regan*, 468 U.S. at 653, 104 S.Ct. at 3269.

We must be chary of striking down an Act of Congress, particularly one that promotes interests as vital as protecting children from sexual exploitation. We have already saved section 2252(a)'s companion statute from unconstitutionality by correcting a very similar defect. *Kantor*, 858 F.2d at 542-44. I see no impediment to saving the statute once again; in fact, the second time around should be easier than the first.

CONCLUSION

After *Osborne*, it's settled that recklessness is a sufficient level of scienter under the First Amendment in a child pornography case; accordingly, I dissent from Part II(B) of the majority opinion which announces a knowledge requirement. Building on

this distinct starting point with respect to mental state, I also disagree with Part II(A), which holds that our prior decisions preclude reading a recklessness requirement into section 2252. I join the other parts of the opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-295 KN

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUBIN GOTTESMAN, INDIVIDUALLY AND DBA AS R.G. SALES COMPANY, X-CITEMENT VIDEO, INC., DEFENDANTS

[Filed June 2, 1990]

ORDER RE CONSTITUTIONALITY OF 18 U.S.C. § 2252

The Court having received and considered the briefing supplied by both parties on the issue of whether 18 U.S.C. § 2252 is unconstitutional in light of *United States v. Thomas*, No. 88-5325 (9th Cir. Jan. 10, 1990), and having reopen [*sic*] the case specifically for this purpose HEREBY FINDS the statute constitutional.

Section 2252(a) provides:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252. In *Thomas*, the Ninth Circuit held that in subsection (1) "'knowingly' modifies only 'transports or ships,'" and "[i]n subsection (2) 'knowingly' modifies only 'receives'." *Thomas*, slip. op. at 307. This section "does not require that a defendant know that the material transported, mailed and received involved a minor." *Id.*

In *Thomas*, the government charged defendant with violations of 18 U.S.C. § 2251 and 2252. Each count concerned the same 13-year-old girl used by defendant to make a pornographic film which he then transported and received, in violation of 2252. The trial court in *Thomas* required the government to prove the defendant's knowledge of the victim's minority as part of its case-in-chief. The trial court instructed the jury that it must find scienter as to the victim's minority both as to the Section 2251 count and as to the Section 2252 counts.

Following the conviction of Mr. Thomas, the Ninth Circuit held in another case that the government was not required to prove the defendant's knowledge of the child's minority in a Section 2251(a) prosecution.

United States v. United States District Court, 858 F.2d 534, 538 (9th Cir. 1988). However, First Amendment concerns prompted a majority of the panel to add a good faith defense to the statute. *Id.* The Ninth Circuit, in *Thomas,* held that government had proved more than was required under the statute and that Section 2252 simply did not mandate proof that Thomas knew that the victim was a minor. *Thomas,* slip op. at 306. As the court stated:

> The section ... does not require that Thomas knew that the pornography he transported, mailed, and received involved a minor. The section requires only that Thomas knowingly transported and received the material. Cf. *United States v. United States Dist. Court for the Central District of Cal.,* 858 F.2d 534, 537-38 (9th Cir. 1988) (section 2251(a)'s wording and legislative history makes clear that it does not require knowledge of the child's age).

Id. at 307. The court in *Thomas* did not consider, or express any opinion as to whether § 2252 is unconstitutional for not requiring knowledge of the minor's age as an element of the offense.

A. *Constitutionality of Section 2252*

Defendants maintains [*sic*] that the holding in *Thomas* should change this Court's findings with respect to the constitutionality of § 2252. Without a scienter requirement, defendants assert, the statute violates the First Amendment.

(1) History of the Statute

The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2251, *et seq.* ("the

Act"), was enacted in response to concern with the overall chain of commercial child pornography. Originally, the Act proscribed the transportation of child pornography "for the purpose of sale or distribution for sale." This has been construed broadly and includes any future plan or scheme of the commercial pornographer to sell or to distribute the obscene prints for sale. *United States v. Langford,* 688 F.2d 1088, 1095 (7th Cir.), *cert. denied* 461 U.S. 959 (1982).

Congress amended the Act in 1984 after finding that child pornography had developed into a highly organized multi-million dollar industry which operates on a nationwide scale exploiting thousands of children. P.L. 98-292 § 2, 98 Stat. 204. The amended Act deleted the language which required that the child pornography be transported for the purpose of "sale or distribution of sale" in order to broaden the scope of the statute, and no longer required that the visual depiction be obscene but merely that it involve the use of a minor engaged in sexually explicit conduct. 18 U.S.C. § 2252(a).

(2) Overbreadth and Vagueness

As the Supreme Court held in *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973), to find a conduct-regulating statute, such as § 2252, unconstitutionally overbroad, its overbreadth must be "substantial" when judged in relation to its legitimate sweep. *See United States v. Tolczeki,* 614 F. Supp. 1424, 1429-30 (N.D. Ohio 1985) (upholding validity of § 2252(a) after concluding statute not overbroad restriction of First Amendment rights); *United States v. Anderson,* 610 F. Supp. 246, 249 (N.D. Ind. 1985) (finding language of § 2252 not unconstitutionally overbroad).

Moreover, courts have held that § 2252(a) was sufficiently specific and definite to give fair notice to potential offenders in that it did not cause persons of common intelligence to guess as its meaning and differ as to its application. *Tolczeki,* 614 F. Supp. at 1425. We agree and find that § 2252(a) does give adequate notice to those who are subject to it and cannot, therefore, be found void for vagueness. Even if this Court were to find vagueness in the language, as the Ninth Circuit held in *United States v. Fogarty,* 663 F.2d 928, 929 (9th Cir. 1981), 18 U.S.C. § 2253 defines the terms of § 2252 and would cure any vagueness in § 2252.

(3) Lack of Mens Rea Requirement

Despite the statute's lack of a mens rea requirement, criminal intent to violate the law, its constitutionality has been upheld. As the court in *Tolczeki,* 614 F. Supp. at 1429 found, Congress specifically omitted a mens rea requirement for conviction under the statute in order to establish a per se rule making it illegal for persons to knowingly transport, ship, receive or distribute in interstate or foreign commerce, or mail, or reproduce for distribution in interstate or foreign commerce or through the mail the prohibited material involving sexual exploitation of minors. *Id.*

(4) The Knowledge Requirement

In *United States v. Merchant,* 803 F.2d 174, 177 (5th Cir. 1986), the court finding the evidence sufficient to support a determination that defendant intended to and knowingly received child pornography stated as follows:

> Because we draw all inferences in favor of the government, the fact of receipt by itself *might* be sufficient to infer, beyond a reasonable doubt, that the receiver knows what he obtains. There can, it is true, be possession or receipt of objectionable material in ways that perfume the contents possessed or received. When the receipt occurs at the invention or with the consent of the possessor, it is more difficult to camouflage the fulsome scent of forbidden knowledge. Here, there is a veritable sty full of facts and inferences from which to detect the fragrance of scienter.

Id. While this Court in its findings grappled with the same issue of implied scienter as did the Fifth Circuit in *Merchant,* the Court finds it appropriate to modify its findings in light of *Thomas.* Assuming the statute has no scienter requirement as to the minor's age, either express or implied, the Court upon careful consideration of the evidence in this case, finds that § 2252 is still constitutional both on its face and as applied to these defendants.

The government met its burden under the statute when it proved that defendant had knowledge of the "character and contents" of the material and that Mr. Gottesman was not a mere delivery person with no idea whether the package contained books or widgets.

The Court modifies its findings in light of *Thomas* to the extent that this Court found in Conclusions of Law ¶ 2, that § 2252 "implies a scienter requirement" and that the Government "was required to prove and did prove scienter by showing that defendants knew that the person depicted in the videotapes was under 18 years of age." The findings should properly state:

2. 18 U.S.C. § 2252(a) is not unconstitutionally overbroad or void for vagueness. The Court finds that the Ninth Circuit's determination in *United States v. Thomas,* No. 88-5325 slip op. 299 (9th Cir. Jan. 10, 1990), that § 2252 requires no knowledge of the minor's age does not impermissibly chill the distribution of constitutionally protected material. Moreover, the Court finds the statute sufficiently specific and definite to give fair notice to potential offenders so as not to be deemed void for vagueness. In this case, the Government has provided more than sufficient evidence of knowing receipt of sexually explicit materials.

The Court, in light of *Thomas,* feels it is appropriate to delete Conclusion of Law ¶ 4 and replace it with the following:

4. Defendants have failed to demonstrate that the statute's potential illegitimate sweep far exceeds its legitimate application.

To the extent that these amended conclusions of law may be deemed findings of fact they are incorporated by reference.

IT IS SO ORDERED

DATED: June 29, 1990

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 88-295 KN

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS R.G. SALES COMPANY, STEVEN ORENSTEIN, AND X-CITEMENT VIDEO, INC., DEFENDANTS

[Filed Sept. 20, 1989]

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE COUNTS 9, 10 AND 11

The Court, having received and considered the evidence presented, having heard the testimony of witnesses and the arguments of counsel, HEREBY RENDERS the following Findings of Fact Re Counts 9, 10, and 11 of the indictment.

I. INTRODUCTION

Pursuant to Federal Rule of Criminal Procedure 23, this case was tried without a jury. Defendants formally waived the jury with the consent of the Government and the approval of the Court. The case was submitted to the Court for a verdict. The Court found all defendants guilty of Counts 9, 10 and 11 of the indictment.

II. FINDINGS OF FACT

1. In Count 9 of the indictment, the Grand Jury charged that on certain dates defendants Rubin Gottesman, X-Citement Video, Inc. and R.G. Sales Company conspired to knowingly distribute visual depictions that had been and were shipped in interstate commerce, which contained a minor engaged in "sexually explicit conduct," as defined in 18 U.S.C. § 2252(a)(2). The indictment alleges that such depictions violated that section.

2. Count 10 of the indictment alleges that on or about February 6, 1987, the defendants, Rubin Gottesman and X-Citement Video, Inc., did unlawfully and knowingly distribute visual depictions that had been transported in interstate commerce, with such visual depictions involving the use of Traci Lords, a female minor, engaging in sexually explicit conduct in the video tapes entitled, "Traci Lords;" and "Lust in the Fast Lane." The indictment further alleges that such actions were in contravention of 18 U.S.C. § 2252.

3. Count 11 of the indictment alleges that on or about April 30, 1987, defendants Rubin Gottesman, X-Citement Video, Inc., and R.G. Sales Company, did unlawfully and knowingly distribute visual depictions that had been transported in interstate commerce, with such visual depictions involving the use of a minor, Traci Lords, engaging in sexually explicit conduct. The videotapes are entitled: "Sex Shoot"; "Aroused"; "Sweet Little Things"; "Harlequin Affair"; "Screaming Desire"; "Joys of Erotica Series 114"; and "Pleasure of Productions Volume 10." The indictment further alleges that such actions violated 18 U.S.C. § 2252.

4. Traci Lords was under age at the time she made the following films: "Traci Lords"; "Lust in the Fast Lane"; "Sex Shoot"; "Aroused"; "Sweet Little Things"; "Harlequin Affair"; "Screaming Desire"; and "Joys of Erotica Series 114"; "Pleasure Productions Volume 10."

5. Traci Lords engaged in at least one sexually explicit act, as the term is defined in 18 U.S.C. § 2256, in each of the above-named films.

6. Defendants received several videotapes featuring Traci Lords from a source in Texas. The tapes contained visual depictions of a minor engaging in sexually explicit conduct.

7. Defendants knew that Traci Lords was under age when she made the films defendant's transported or shipped in interstate commerce.

8. Defendants maintained these videotapes in the inventory of X-Citement Video, Inc.

9. The videotapes were distributed and sold by defendants.

10. Defendants shipped the videotapes featuring Traci Lords, through interstate commerce, to Hawaii. On April 28, 1987, Steven Takeshita, an undercover police officer of the Los Angeles Police Department, purchased seven tapes featuring Traci Lords from the defendants for $200.00. These tapes were subsequently shipped to Hawaii and received by the Federal Bureau of Investigation in Hawaii on or about April 30, 1987. These actions were in violation of 18 U.S.C. § 371.

11. Defendants Rubin Gottesman and X-Citement Video, Inc. knowingly sold video cassette tapes entitled "Traci Lords" and "Lust in the Fast Lane" to undercover officer Steven Takeshita on or about February 6, 1987.

12. The videotapes sold to the undercover police officer had previously been transported in interstate commerce from Texas.

13. Defendants Rubin Gottesman, X-Citement Video, Inc. and R.G. Sales Company knowingly sold video cassette tapes to police officer Takeshita on or about April 28, 1987. The video cassette tapes sold are entitled: "Sex Shoot"; "Aroused"; "Sweet Little Things"; "Harlequin Affair"; "Screaming Desire"; "Joys of Erotica Series 114"; and "Pleasure Productions Volume 10."

14. After the sale of the above-mentioned video cassette tapes, defendants shipped said tapes to Hawaii. The tapes arrived in Hawaii on or about April 30, 1987.

III. CONCLUSIONS OF LAW

1. The Child Pornography Act, 18 U.S.C. § 2252 provides in pertinent part:

> (a) any person who—
>
> (1) Knowingly transports or ships in interstate . . . commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual or print medium depicts such conduct . . . shall be punished as provided in subsection b of this section.

18 U.S.C. § 2252.

2. The Court finds, as it did in denying pre-trial motions on this issue, that 18 U.S.C. § 2252 is constitutional; that the statute does imply a scienter requirement; and that the Government was required to prove and did prove scienter by showing that defendants knew that the person depicted in the videotapes was under 18 years of age.

3. It is axiomatic that to know the nature and character of child pornography, almost by definition, one must know that it depicts children. *United States v. Shetin*, 86 CR-480, slip op. at 21-22 (S.D.N.Y. 1987).

4. In *United States v. United States District Court for the Central District of California, Los Angeles*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that 18 U.S.C. § 2251(a) which prohibits the production of materials depicting a minor engaged in sexually explicit conduct does not require knowledge of the minor's age. The court distinguished the scienter requirement for producers under § 2251, "who are in a position to know or learn the ages of their employees," from that for distributors, "from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape." *Id.* at 543-44 n.5. "While it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they had no direct contact. . . , producers are in a position to know or learn the ages of their employees" *Id.* at 544.

5. The Government has proved beyond a reasonable doubt that defendants knew that Traci Lords was under age when she made the films defendants transported or shipped in interstate commerce.

6. The Government has proved beyond a reasonable doubt that Traci Lords was in fact underage when she made the films introduced into evidence.

To the extent that the preceding Conclusions of Law may be deemed to be Findings of Fact, they are hereby incorporated by reference into the Findings of Fact.

IT IS SO ORDERED.

DATED: September 20, 1989

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA Nos. 89-50556 and 89-50562
DC Nos. CR-88-0295-KN-3 and CR-88-0295-KN-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

X-CITEMENT VIDEO, INC., DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RUBIN GOTTESMAN, DEFENDANT-APPELLANT

[Filed July 9, 1993]

BEFORE: CANBY, KOZINSKI and FERNANDEZ, Circuit Judges

ORDER

A majority of the panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. Judge Kozinski would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has voted upon the suggestion for rehearing en banc and the suggestion for rehearing en banc has failed.

Accordingly, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

At the time of the acts alleged in the indictment, Chapter 10 of Title 18 provided in pertinent part, as follows:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in,,[1] or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

[1] So in original.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce or mailed.

(d) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

* * * * *

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape.

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